

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

CHOOSECO LLC,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 2:19-cv-00008-wks
)	
NETFLIX, INC.,)	
)	
Defendant.)	

**PLAINTIFF CHOOSECO LLC’S MOTION FOR LEAVE TO FILE A SUR-REPLY
BASED ON NEW FACTS**

Plaintiff Chooseco, LLC (“Chooseco”), through its counsel, requests leave to file the attached sur-reply in opposition to Defendant Netflix Inc.’s (“Netflix”) Motion to Dismiss. *See* ECF. No. 18 (Motion to Dismiss); 24 (Chooseco’s Opposition); 25 (Netflix’s Reply). Although filing a sur-reply is not specifically contemplated by Local R. 7(a), facts that were not known at the time Chooseco submitted its Opposition but are nevertheless relevant to the Court’s consideration of Netflix’s motion to dismiss have since emerged. These facts contradict Netflix’s statement in its reply memorandum that it “never used [the phrase CHOOSE YOUR OWN ADVENTURE] to market the film” Reply, ECF No. 25 at 12. For the sake of efficiency and fairness, Chooseco submits that the allegations and argument in its proposed sur-reply, attached hereto as Exhibit A, should be considered as the Court rules on Netflix’s motion to dismiss. Chooseco could not have included them in its Amended Complaint or Opposition because they were not known at the time either was filed. The proposed sur-reply is narrowly focused on presenting these new facts to the Court.

Pursuant to Local R. 7(a)(7) undersigned counsel certifies that it has made a good faith attempt to obtain Netflix's agreement to its request to file a sur-reply, but counsel for Netflix did not consent.

Because new facts that bear on the Court's consideration of Netflix's motion to dismiss have emerged, Chooseco respectfully requests that the Court grant its motion for leave to file a sur-reply and consider that sur-reply in connection with the pending motion.

DATED at Burlington, Vermont this 19th day of July, 2019.

By: /s/ Shapleigh Smith, Jr.
Shapleigh Smith, Jr., Esq.
Kendall Hoechst, Esq.
Dinse P.C.
209 Battery Street, P.O. Box 988
Burlington, VT 05402
802-864-5751
ssmith@dinse.com
khoechst@dinse.com

Counsel for Chooseco LLC